Supreme Court
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No.

IN THE
Supreme Court of the United States

GREGORY T. HARWOOD,
Petitioner

v.

STATE OF TENNESSEE

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

GREGORY P. ISAACS
Counsel of Record
For the Petitioner
ISAACS-RAMSEY LAW FIRM
618 SOUTH GAY STREET
SUITE 300
KNOXVILLE, TENNESSEE 37902
(865) 673-4953

QUESTION PRESENTED

Whether a state law that criminalizes the possession of drawings, photographs, and other materials that depict a minor engaged in sexual or simulated sexual activity, with statutory language which permits an inference that a participant is a minor, is unconstitutionally overbroad and violates First, Fifth and Fourteenth Amendment protections as defined in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

PARTIES TO THE PROCEEDING

The Petitioner in this Court is Gregory T. Harwood.

The Respondent is the State of Tennessee.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gregory T. Harwood respectfully petitions, under Supreme Court Rule 12.4, for writ of certiorari to the Tennessee Supreme Court in *State v. Pickett and Harwood*, 211 S.W.3d 696 (Tenn. 2007).

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is published at 211 S.W.3d 696 and is reprinted at App. 1. The opinion of the Tennessee Court of Criminal Appeals is unpublished and appears at App. 32.

STATEMENT OF JURISDICTION

The Tennessee Supreme Court issued its final judgment in this matter on January 22, 2007. This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . .. "

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United states Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Relevant statutory provisions of the Tennessee Code Annotated are reproduced at App. 180-85.

I. STATEMENT OF THE CASE

On April 25, 2003, the Petitioner was indicted and charged with four counts of sexual exploitation of a minor in violation of Tenn. Code Ann. § 39-17-1003 (2003). On May 4, 2004, Petitioner Harwood filed a Motion to Dismiss the Indictment and supporting memorandum challenging the constitutionality of the statute under which he was charged. App. 101. On July 13, 2004 the trial court denied Harwood's motion to dismiss holding that Tenn. Code Ann. § 39-17-1003 was constitutional on its face. App. 69.

On July 19, 2004 the trial court granted Harwood's request for an interlocutory appeal in accordance with Rule 9 of the Tennessee Rules of Appellate Procedure on the bases that (1) Harwood would suffer irreparable harm from any conviction resulting from these charges, (2) an interlocutory finding by a higher court that the statute is unconstitutional would prevent needless, expensive and

protracted litigation, and (3) certain portions of Tenn. Code. Ann. § 39-17-1003 were in need of clarification in light of This Honorable Court's recent holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). App. 87.

On August 20, 2004, the Tennessee Court of Criminal Appeals accepted Petitioner's interlocutory appeal. On September 7, 2005, the Court of Criminal Appeals issued its opinion affirming the trial court's holding that Tenn. Code Ann. § 39-17-1003 (2003) is constitutional on its face (App. 32), despite a ruling less than six (6) months before by the Court of Criminal Appeals which held a subsection of this statute to be unconstitutional after *Free Speech*. *See State v. Butler*, unpublished opinion (Tenn. Crim. App. Mar. 30, 2005), App. 136. In addressing this discrepancy, the court stated:

> We note at the outset that we are aware that a panel of this court recently held subsection (b) of the

child exploitation statute unconstitutional and, in turn, elided it. However, upon our research and analysis, we reach a conclusion contrary to that expressed in *Butler* . . . [W]e conclude that [the CPPA and Tenn. Code Ann. § 39-17-1003] can be sharply distinguished. . . . [T]he permissive inference of minority does not expand the scope of the statute to include virtual images and youthful looking actors but merely allows the trier of fact to deem the circumstantial evidence before them sufficient proof that the subject material portrayed an actual minor. This is vastly different from the CPPA, whose scope was far greater and required defendants to almost without fail, work from a deficiency in an attempt to prove that the speech was not unlawful under the far-reaching bounds of the Act.

State v. Harwood (Tenn. Crim. App. Sept. 7, 2005), App. 35, 67. The Tennessee Supreme Court granted review on January 30, 2006, and in a unanimous opinion held that the statute was facially constitutional. The Tennessee Supreme Court opined:

> In our view, the plain language of [Tenn.Code Ann. § 39-17-1003(a) (2003)] requires that the image be of a minor. This language is markedly different from the statute at issue in Free Speech Coalition, which criminalized the possession of any sexually explicit image that "is, or appears to be" of a minor. . . . Moreover, we are not persuaded that the language of subsection (b) expands the coverage of subsection (a) to include constitutionally protected speech . . .. In consequence, it is our view that 39-17-1003(b) (2003), which can best be

described as a permissive inference, is not unconstitutionally overbroad.

Further, it is our view that the statute does not impermissibly shift the burden to the defendant to prove that the image does not depict a minor . . .. A permissive inference allows, but does not require, the triers of fact to infer the elemental fact from proof by the State of the basic fact and places no burden of any kind on the defendant. Conversely, a mandatory presumption violates due process because it shifts the burden to the defendant. It is our view . . . that the statute does not unconstitutionally shift the burden of proof.

State v. Pickett and Harwood, 211 S.W.3d 696, 703, App. 17-20 (internal citations omitted).

II. REASONS FOR GRANTING THE WRIT

While there are differences between the statutory language of the Child Pornography Prevention Act of 1996 ("CPPA") that This Court held to be unconstitutional in *Ashcroft v. Free Speech Coalition* and that of Tennessee's sexual exploitation statute, Tenn. Code Ann. § 39-17-1003, both statutes permit the trier of fact to infer that an image depicted is or appears to be a minor. The effect of the evidentiary inferences allowed under Tennessee's statute is indistinguishable from that in *Free Speech*. In *State v. Pickett and Harwood* (hereinafter *Harwood*), the Supreme Court of Tennessee held that "Tenn. Code Ann. § 39-17-1003(b)(2003), which can best be described as a permissive inference, is not unconstitutionally overbroad." 211 S.W.3d 696, 703 (Tenn. 2007). This statute's "permissive inference," like the unconstitutional language in the CPPA, "leaves unprotected a substantial amount of speech not tied

to the Government's interest in distinguishing images produced using real children from virtual ones." *Free Speech*, 535 U.S. at 255.

The Tennessee Supreme Court misread *Free Speech* as proscribing legislation which includes a mandatory presumption that an image "is, or appears to be" a minor, but which did not involve the exploitation of actual children, i.e., virtual images. This erroneous interpretation represents a fundamental constitutional error. Any modification of *Free Speech* should come from This Court and not the Tennessee Supreme Court.

The decision of the Tennessee Supreme Court, if left unresolved, will foster continued confusion in other states. Indeed, much uncertainty and inconsistency exists among the courts of several states concerning the constitutionality of the various sexual exploitation statutes in light of *Free Speech*. *See State v. Martin*, 674 N.W. 2d (S.D. 2003); *State*

v. Cannady, 727 N.W.2d 403 (Minn. 2007); *and Rutti v. State*, 100 P.3d 394 (Wyo. 2004). Accordingly, This Court should grant the petition for writ of certiorari.

A. The Tennessee Supreme Court's Decision is Irreconcilable with This Court's Decision in *Ashcroft*.

1. Tennessee's Statute Permits an Unconstitutional Inference that a Participant is a Minor

The Tennessee Supreme Court reasoned *Harwood* was distinguishable from *Free Speech*, holding that Tenn. Code Ann. § 39-17-1003(b), which allows a trier of fact to "infer that a participant is a minor," is "markedly different" from the CPPA's criminalization of an image that "is, or appears to be" of a minor. *Harwood*, 211 S.W. 3d at 703, App. 17. Thus, the Tennessee Supreme Court reasoned that only a mandatory presumption that an image depicts a

minor violates due process and unconstitutionally shifts the burden of proof to the defendant. The Tennessee Supreme Court's ruling regarding the appearance of a participant in *Harwood* can be reduced to three points: (1) the Tennessee statute allows an inference that a participant is a minor, (2) the statute places no burden on the defendant to prove that the image is not a minor, and (3) therefore, the statute passes constitutional muster.

The Petitioner asserts that the first point does not inevitably lead to the conclusion that Tennessee's sexual exploitation statute places no burden on the defendant to prove that the participant is not a minor, nor does the statute pass constitutional muster. The trier of fact's inference itself—that the material "depicts a minor"—triggers the due process violation in the Tennessee statute. The fallacy in *Harwood* is that it makes absolutely no difference whether the inference is mandatory or permissive. As soon as the

trier of fact infers that the material depicts a minor, the burden unconstitutionally shifts to the defendant to prove that no actual children were exploited in the production of the materials to avoid conviction. In so doing, Tennessee's sexual exploitation statute unconstitutionally shifts the burden of proof and is overbroad, abridging a substantial amount of lawful speech.

This case is indistinguishable from *Free Speech* which held unconstitutional two provisions of the CPPA. Those provisions defined child pornography as (1) "any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture" that "is *or appears to be*, of a minor engaging in sexually explicit conduct" (18 U.S.C. § 2256(8)(B)), and (2) "any sexually explicit image that was advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* it depicts a minor engaging in

sexually explicit conduct" (18 U.S.C. § 2256(8)(D)) (emphasis added). *Free Speech*, 535 U.S. at 241-42. These two provisions were struck down on the basis that they were overbroad and abridged the defendant's right to engage in a substantial amount of protected free speech under the First Amendment. *Id.* at 258.

This Court in *Free Speech* held that the CPPA was inconsistent with the rulings of *Miller v. California*, 413 U.S. 15 (1973) and *New York v. Ferber*, 458 U.S. 747 (1982). The *Miller* standard for determining whether material is obscene requires the Government to prove that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Free Speech*, 535 U.S. at 246 (citing *Miller*, 413 U.S. at 24). The CPPA prohibited constitutionally protected materials that met the *Miller* test,

because, the CPPA extended to images that need not appeal to the prurient interest nor be patently offensive. *Id.* Any material that explicitly depicted people under the age of eighteen engaged in sexual activity, notwithstanding the manner in which it is presented, was proscribed. *Id.* As a result, the CPPA prohibited speech that has serious redeeming value. *Id* at 248. This Court in *Free Speech* stated:

> Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. . . . Whether or not the films [mentioned in the opinion] violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would

> be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: [t]he artistic merit of a work does not depend on the presence of a single explicit scene.

Id. According to This Court, the CPPA's broad prohibition of any material, regardless of prurient interest, was a clear affront to the constitutional liberties guaranteed by the First Amendment.

This Court further held that the CPPA violated the holding in *Ferber*. 458 U.S. at 747. The *Ferber* Court upheld a prohibition of the sale, distribution, and production of child pornography because these acts were "intrinsically related" to the sexual abuse of children in two ways. *Free Speech*, 535 U.S. at 249 (citing *Ferber*, 458 U.S. at 759). First, the materials were a permanent record of the child's

abuse, and continued circulation would have been harmful to the child who had participated. *Id.* (citing *Ferber*, 458 U.S. at 759). Second, the State had an interest in closing the child pornography distribution network because of the economic motivation for its production. *Id.* (citing *Ferber*, 458 U.S. at 760).

Based on either of these rationales, the *Ferber* Court's holding was limited to banning speech that was a proximate link to the criminal conduct set forth in the statute. *Id.* at 250. *Ferber* banned speech that itself was the record of sexual abuse, whereas the CPPA and Tenn. Code Ann. § 39-17-1003 prohibit speech that records no crime and creates no victims by its production, i.e., "virtual child pornography" or materials that use youthful looking adult actors or models. *Id.* Tennessee's permissive inference that material depicts a minor is indistinguishable from the unconstitutional "is, or appears to be" provision of the

CPPA. The Tennessee Supreme Court holding in *Harwood* must be reversed.

2. Tennessee's Statutory Definition of "Material" is Overbroad

The Tennessee Supreme Court read *Harwood* as distinguishable from *Free Speech*, holding that Tenn. Code Ann. § 39-17-1002(2) "requires proof that the materials depict *actual* minors." *Harwood*, 211 S.W.3d at 704 (emphasis added). The court's ruling regarding the definition of "material" in *Harwood* can be summarized as: (1) the state must convince the trier of fact that the materials depict minors, (2) "actual" minors are depicted, and (3) therefore, the "material" definition for this statute passes constitutional muster.

The Petitioners assert that the trier of fact's ability to infer that material depicts a minor does not inevitably lead to "proof that the materials depict actual minors."

Significantly, at no place in the statute is the term "actual minor" used.[1] The Tennessee Supreme Court's conclusion

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[1] The July 1, 2005 amendment to this statute also never mentions an "actual minor." The statute now provides:

> (a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:
>
> (1) Sexual activity; or
>
> (2) Simulated sexual activity that is patently offensive.
>
> (b) A person possessing material that violates subsection (a) may be charged in a separate count for each individual image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation. Where the number of materials possessed is greater than fifty (50), the person may be charged in a single count to enhance the class of offense under subsection (d).
>
> (c) In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other

that the statute's definition of "material" is not subject to the *Miller* test, therefore, does not follow. This prohibition, which includes drawings, virtual images, and other materials produced without the exploitation of actual children, does not pass constitutional muster.

Tenn. Code Ann. § 39-17-1003(a) proscribes any material that includes a minor engaged in sexual activity or simulated sexual activity that is patently offensive. "Material" is defined as:

> relevant evidence, in determining whether a person knowingly possessed the material, or in determining whether the material or image otherwise represents or depicts that a participant is a minor.
>
> . . .

Tenn. Code Ann. § 39-17-1003 (2005).

> (A) Any picture, drawing, photograph, motion picture film, videocassette tape or other pictorial representation; or
>
> (B) Any statue, figure, theatrical production or electrical production; or
>
> (C) Any text or image stored on a computer hard drive, a computer disk of any type, or any other medium designed to store information for later retrieval[.]

Tenn. Code Ann. § 39-17-1002(2)(A)-(C) (2003). This overbroad definition, like the CPPA, fails under both the *Miller* and *Ferber* analyses.

The sexual exploitation statute, Tenn. Code Ann. § 39-17-1003, criminalizes materials that are not intrinsically related to the sexual abuse of children. Under its definitions, "material" is exceptionally broad, including "any picture, drawing . . . or other pictorial representation," "any statue,

figure, theatrical production or electrical production" and "any text or image stored on a computer hard drive . . .." *Id.* These images, many created without human models or images of actual minors, reach well beyond the legislative intent of protecting children from harm. Although the statute's purpose is to prohibit the exploitation of actual children, the statute is not narrowly tailored to meet that goal.

As with the CPPA, pursuant to § 39-17-1002(2)(A)-(C), any material, even if it meets the *Miller* standard (i.e., material that does not appeal to prurient interests, is not patently offensive, or has serious literary, artistic, political, or scientific value) is proscribed. The definition of "material" in this statute also goes well beyond the holding in *Ferber*, which prohibits the sale, distribution and production of child pornography because these acts are "intrinsically related" to the sexual abuse of children. *Free*

Speech, 535 U.S. at 250 (*citing Ferber,* 458 U.S. 759). Finally, the CPPA provisions held unconstitutional by *Free Speech* mirrors the Tennessee statute which "prohibits speech that records no crime and creates no victims by its production." *See Free Speech*, 535 U.S. at 250.

The definition of "materials" as applied to Tenn. Code Ann. § 39-17-1003(a) prohibits a substantial amount of protected speech, without satisfying a prurient interest standard as required under *Miller*, in addition to the rationale of both *Ferber* and *Free Speech*. This statute's prohibitions are unconstitutional and deprive the citizens of the State of Tennessee of their constitutional right to engage in a substantial amount of protected speech pursuant to the First Amendment to the United States Constitution.

B. The Tennessee Supreme Court's Decision Directly Conflicts with Other State Supreme Courts' Interpretations of *Ashcroft*.

Review is appropriate here because of the split of authority among states[2] as to whether an inference regarding a minor's age in sexually explicit materials is appropriate after *Free Speech*, and as to the application of the First Amendment to sexually explicit material produced in such a way that no actual minor is depicted, exploited, or harmed.

In *State v. Martin*, 674 N.W.2d 291 (S.D. 2003), South Dakota's Supreme Court held that the state's child

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[2] A similar split in authority exists within the State of Tennessee, where one panel of the Court of Criminal Appeals in *State v. Butler*, App. 136, questioned the constitutionality of Tenn. Code Ann. § 39-17-1003(b) after *Free Speech*, yet another panel of the Court of Criminal Appeals held that the same subsection is constitutional in the instant case, *State v. Harwood*, 2005 WL 2205854 (Tenn. Crim. App.) App. 32, and *State v. Pickett*, 2005 WL 2438385 (Tenn. Crim. App.).

pornography statute, which prohibits "any depiction fixed in any tangible medium of expression of a minor . . . engaging in a prohibited sexual act . . .," is not unconstitutionally vague.

In contrast, the Supreme Court of Minnesota, in *State v. Cannady*, 727 N.W.2d 403 (Minn. 2007), held unconstitutional one subdivision of its pornography statute which provided that the legislative intent was to "penalize possession of pornographic work[s] depicting sexual conduct which involves minors or appears to involve minors . . .."

In a similar case heard in the Supreme Court of Wyoming, *Rutti v. State*, 100 P.3d 394 (Wyo. 2004), that court affirmed the decision of the lower court on different grounds. In Rutti's claim of unconstitutionality, he argued that the state's entire statute was facially overbroad. The court chose to avoid the constitutional question altogether.

Despite minimal differences in the statutory language of the various state statutes, the holding in *Free Speech* left many unanswered questions about what precautions a state must take to protect a defendant's constitutional rights related to the possession of materials and images depicting minors. This Court should resolve the issue here in *Harwood*, which can serve as a precedent in other jurisdictions, as well as in the State of Tennessee.

III. CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

GREGORY P. ISAACS
Counsel of Record
For the Petitioner
ISAACS-RAMSEY LAW FIRM
618 SOUTH GAY STREET
SUITE 300
KNOXVILLE, TENNESSEE 37902
(865) 673-4953